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NO 22485

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD POOL,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

"Appellant commenced his trial before a jury on four counts, two charging the concealment and two charging sale of two amounts of heroin. [21 U. S. C. §174] During the jury trial, the parties signed a stipulation of facts, and the case was thereafter tried by the court. Appellant was found guilty on each count, and sentenced to ten years -- five years on each count, counts three and four to run consecutively with one and two, respectively," Pool v. United States, 344 F. 2d 943 (9th Cir. 1965), cert. den. 382 U. S. 832 (1965).

Pool filed the instant Section 2255 motion on May 19, 1967

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I

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[C. T. 2]. [1] On October 18, 1967, there was filed and entered by the District Court an Order Denying Motion [§2255 of Title 28, United States Code] [C. T. 74].

Appellant filed, on December 15, 1967, a Notice of Appeal [C. T. 103].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231; Title 21, United States Code, Section 174, and Title 28, United States Code Section 2255.

This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . , or is otherwise subject

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[1] "C. T." refers to the Clerk's Transcript.

to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

QUESTIONS PRESENTED

A. Whether appellant was denied the effective aid of counsel at trial or on appeal.

B. Whether appellant was denied a jury trial or a trial of any kind.

C. Whether appellant was compelled to be a witness against himself.

D. Whether appellant's conviction was based upon illegally obtained evidence and whether such an issue may be raised in a 2255 motion.

E. Whether a delay of one month between arrest and indictment requires the vacating of a judgment.

F. Whether an evidentiary hearing was required on this instant 2255 motion.

IV

STATEMENT OF FACTS

There will shortly be made a motion to supplement the record on appeal so that the Court may have before it the Clerk's and Reporter's Transcripts of proceedings that were before it on the direct appeal. In expectation of the granting of said motion reference will be made to said transcripts as "R. T." for Reporter's Transcript and "C. T. I" for the original Clerk's Transcript.

Appellant was indicted on February 19, 1964 [C. T. I, 2-5], arraigned, and pleaded not guilty [C. T. I, 8].

The case was thereafter assigned to the Honorable Leon R. Yankwich for all further proceedings [C. T. I, 8].

On May 26, 1964, the case came on for trial before Judge Yankwich. A jury, together with one alternate, was impanelled and sworn; the Assistant United States Attorney, Ronald Morrow, made an opening statement; appellant's attorney Joe Ingber, reserved opening statement; and the court admonished the jury and recessed until May 27, 1964, at 10:00 A. M., for further trial [C. T. I, 16].

On May 27, 1964, at 10:21 A. M., court convened with appellant, appellant's counsel, and Government counsel present, outside the presence of the jury. The Government moved to revoke appellant's bail, a hearing was held upon said motion and the Court ordered motion denied [C. T. 17].

After a short recess the following proceedings were had in chambers, out of the presence and hearing of the jury, both counsel and defendant being present:

> "THE COURT: Let the record show these proceedings are had outside the presence of the jury, in the court's chambers, in the presence of the clerk.
>
> "MR. MORROW: Please let the record show that counsel for the Government, the defendant and defendant's counsel are here.
>
> "THE COURT: All right.
>
> "MR. MORROW: Your Honor, counsel for defendant approached me and would like to dispose of this case on a stipulated fact situation, and we will work through the morning and try and have the final stipulation of fact to you by early this afternoon.
>
> "MR. INGBER: It would be the desire of the defendant at this time to waive his right to trial by jury and to submit the matter to the court upon a stipulated set of facts, as the representative of the Government has indicated.
>
> "MR. MORROW: Your Honor, the Government will not consent to the waiver of the jury until the stipulation is drafted and signed.
>
> "MR. INGBER: At which point the waiver will then be effective. I merely want to indicate to

the court that the jury perhaps need not be immediately tied up certainly for this morning.

"THE COURT: Will 2:00 o'clock be enough time?

"MR. INGBER: I hope so.

"THE COURT: Well, we can excuse the jury and tell them they are excused and to come back at 2:00 o'clock." [R. T. 96. 97].

Whereupon the court reconvened in the presence of the jury, the court admonished the jury, and excused them until 2:00 P. M. [C. T. I, 17].

At 2:30 P. M., the court reconvened out of the presence and hearing of the jury, both counsel and the defendant being present [C. T. I, 17].

A stipulation of fact [C. T. 10-15], signed by defendant and both counsel was filed with the court. The court, after reading and considering the stipulation of fact, found the defendant guilty as charged on the four counts of the indictment [R. T. 99, 100].

Thereupon the defendant was sentenced by the court and the jury returned to the courtroom and was discharged [C. T. 17].

The Stipulation referred to above is here set out in full:

1. On Thursday, January 16, 1964, an undercover informant of the Federal Bureau of Narcotics met the defendant EDWARD POOL at a car lot at 89th and San Pedro Streets in

Los Angeles, California. At that time the informant told the defendant that she desired to buy some heroin for a friend of hers. The defendant told the informant to let him know when the friend was ready to buy the heroin.

2. On Friday, January 17, 1964, at about 6:30 P. M., the defendant called the informant by the use of a telephone and asked her when she would be ready to conduct the transaction.

3. At approximately 8:00 P. M., the defendant called again and told the informant that he would meet her at the corner of San Pedro and Colden Streets around 9:00 P. M. The defendant further informed the informant that she would leave her friend, James Parker, an agent of the Federal Bureau of Narcotics, in the car, about a block away.

4. The informant owed the defendant $150 previously. The defendant told the informant to bring as much money as she could, as he was going to Tijuana tomorrow, and was going to make a "big score". At that time the informant told the defendant that she wanted to buy three spoons of heroin for a girl friend of hers.

5. At approximately 9:30 P. M., Agent Parker and the informant arrived at Colden and San Pedro streets in Los Angeles, California, where the agent parked the car.

6. The informant then left the agent in the automobile and went to the southwest corner of Colden and San Pedro Streets where she was met by the defendant.

7. The defendant stated that he did not want to meet

the friend of the informant and for the informant to get the money. The informant told the defendant that her friend would not give up his money unless he saw the heroin.

8. The defendant stated to the informant that the heroin was laying by his feet and that the informant was to pick it up and give it to the man and then get the money and bring it to him at the London House, a club that was being leased by the defendant. The informant told the defendant that she was afraid the friend might take the heroin and not give her the money.

9. The informant then left the defendant and returned to the car where Agent Parker was seated and explained the situation to him. At that time the agent conversed by means of radio communication with surveilling agents of the Federal Bureau of Narcotics in an accompanying car.

10. After conversing with the other agents by means of radio communication, Agent Parker handed to the informant $600 in recorded money. The money consisted of thirty $20 bills.

11. The informant then left Agent Parker's car and returned to the corner. The defendant was not there, and the informant returned the $600 to Agent Parker.

12. The defendant soon reappeared on the scene and parked his black 1958 Oldsmobile station wagon on Main Street north of Colden Street. The informant and Agent Parker then left their automobile and approached the defendant. When the defendant saw Agent Parker approaching he walked away and stopped. When Agent Parker advanced again the defendant retreated again.

Agent Parker returned to the automobile in which he had been sitting and the informant went ahead and met with the defendant.

13. The informant then gave the defendant $100 of the $150 that she owed him. The defendant then handed the informant the key to a 1950 black Buick and told her that on Colden Street near Main Street, there was an old Buick parked and that the key would open the trunk of the car and in there would be the ounce of heroin that her friend requested and also the three spoons of heroin that her girl friend wanted. The defendant informed the informant that he would be parked behind the black 1950 Buick and that she and her friend should park behind him. She was then instructed to take the $600, go to the trunk of the 1950 Buick, take out the packages of heroin, and return to his car, the 1958 Oldsmobile station wagon, and hand him the money.

14. Upon returning to Agent Parker's car, the informant advised Agent Parker of the intended transaction, and Agent Parker contacted the other surveilling agents. At that time it was decided between the agents that they would meet and install upon the person of the informant a Fargo, a transmitting device.

15. At that time all of the agents met with the informant at a location in the vicinity of the intended transaction and there was installed upon the person of the informant the above mentioned Fargo.

16. Agent Parker and the informant then went in Agent Parker's car to the intended site and parked behind the defendant's

black Oldsmobile station wagon. At that time Agent Parker informed the informant that she should do only what he said and that was for her to stay in view and to give the defendant the $600 after she obtained the heroin and then come back to the agent.

17. The informant then went past the defendant sitting in the Oldsmobile station wagon and opened the trunk of the old Buick, extracted the two parcels of heroin, weighing 24.7 grams and 4.83 grams, and closed the trunk of the Buick. The informant then dropped the "three spoons" which were contained in a red balloon in the gutter. The informant then got into the defendant's car and gave him the $600 that the agent had given her. Upon the completion of the sale transaction, the informant left the defendant's car and walked back to the car of Agent Parker and gave him the ounce of heroin.

18. Agent Parker then apprised the accompanying agents that the informant had given him the ounce of heroin and that the informant had given the defendant the $600 of previously recorded money.

19. At that time Agent Parker and the informant drove away while the other car of surveilling agents observed the defendant leave the area where he had been parked and proceed toward the above mentioned London House. As the defendant drove into the parking lot behind the London House, the agents, with the defendant still in view, arrived and informed the defendant that he was under arrest for violation of the Federal Narcotics Laws. At that time the defendant had the $600 of previously recorded money

in his left hand. In the parking lot, at the site of the arrest, the money in the possession of the defendant was compared with the list of serial numbers of the previously recorded money and the serial numbers matched. The above comparison of the money with the list of serial numbers was done in the presence of the defendant.

20. The defendant was then taken to the office of the Federal Bureau of Narcotics.

21. At the Federal Bureau of Narcotics office the informant then, for the first time, informed the agent that she had purchased the above mentioned red balloon of "three spoons" of heroin. The informant was then taken back to the area and at the location she described, Agent Charles Sherman found the red balloon of heroin and picket it up.

22. Upon arrival back at the office of the Federal Bureau of Narcotics, Agent Charles Sherman field tested the contents of the condom containing the ounce of heroin and also the contents of the red balloon for heroin and the test proved to be positive.

23. The two parcels of heroin were weighed and sealed by Agent Charles Sherman on January 17, 1964, and witnessed by Agent John Hunt. The exhibits were then mailed on January 20, 1964, to the United States Chemist, San Francisco, California, via registered mail. Agent Irving Lipschutz accompanied Agent Charles Sherman from the Federal Narcotics Office down to the post office to mail the contents of the package.

24. On January 23, 1964, Herman Meuron, a chemist in the office of the United States Chemist, personally received from a mail-man the above mentioned parcel. Herman Meuron personally tested the contents of the two parcels, the condom and the red balloon. The results of the test disclosed that of the ounce of heroin in the condom 39.7% of the contents was heroin. The test of the contents of the red balloon disclosed that 8.2% of the contents was heroin.

25. On January 18, 1964, in an Attorney's Room in the Hall of Justice, in Los Angeles, California, Agent Irving Lipschutz at the request of the defendant met the defendant. At this meeting in response to the question of what was the defendant's source of supply, the defendant stated that his source of supply was a man by the name of Memo, in Tijuana. In response to the question of whether Memo was the source of supply for the heroin obtained by the Federal Bureau of Narcotics on the previous evening, January 17, 1964, the defendant answered, "Yes".

26. On January 20, 1964, in a fifth floor office of the Federal Bureau of Narcotics in Los Angeles, California, at which the defendant, Agent Irving Lipschutz and Agent Charles Sherman were present, the defendant again answered the question of whether the narcotics obtained on the night of January 17, 1964, were obtained from Memo in Tijuana, the defendant answered, "Yes".

27. On January 21, 1964, the defendant placed a call monitored by Agent James Parker, to a man named Memo in

Tijuana. Pursuant to this call the man named Memo was arrested by Mexican Federal Judicial Agents with the cooperation of the agents of the Federal Bureau of Narcotics. Memo, and his co-conspirators, were convicted for possession of narcotics by the Mexican National Government.

At page 106 of the Reporter's Transcript appears the following statement of defense counsel in response to a request by the prosecution for the immediate remand of the person of the defendant:

> "MR. INGBER:
>
> * * *
>
> The point that I stress, your Honor, is that he came today unprepared to remand himself, fully aware that if a stipulation of those facts were in order he might be able to prepare himself with a presentence report. . . ."

V

ARGUMENT

A. APPELLANT WAS NOT DENIED THE EFFECTIVE AID OF COUNSEL AT TRIAL OR ON APPEAL.

The claim of appellant that he was denied effective aid of counsel can only be sustained if the attorney, or rather attorneys in this case, were "so incompetent or inefficient as to make the trial a farce or a mockery of justice." Dalryruple v. United

States, 366 F. 2d 183 (9th Cir. 1966).

Appellant cites several instances, none of which demonstrate incompetence or a deprivation of rights. Initially, Pool says that his counsel was only given one day to prepare a defense. Pool substituted Joe Ingber for Irving Ackert on the date that had been set for trial approximately six weeks earlier [C. T. I 8; C. T. I 17]. At page 26 of the Reporter's Transcript appears the request on behalf of Pool for a substitution. The Trial Court made it clear that a substitution would not be allowed for the purpose of obtaining a continuance. When counsel for Pool requested some time for preparation after the empanellment of a jury the following colloquy took place, at R. T. 27:

> "THE COURT: I think I said that if you want an added day I will select the jury and send the panel home and give you a day.
>
> "MR. INGBER: That is correct. That will be the only continuance of any nature that would be requested on behalf of the defendant.
>
> "THE COURT: All right.
>
> "THE CLERK: Is that agreeable to you, Mr. Pool, that Mr. Ingber be substituted for your attorney in place of Mr. Ackert?
>
> "THE DEFENDANT: Yes, it is."

Pool next complains "that his counsel did not discuss any defenses to the charges; he did not investigate the law and facts;"

and other complaints, leading to the conclusion "that appellant's trial was reduced to a farce and a sham" (Op. Br. 21). Appellant's claims are the product of a natural dissatisfaction with one's counsel following several years in a penitentiary. The case itself, as shown by the stipulation signed by Pool, was simple. There was no argument as to the facts. There was disagreement as to the effect of the stipulation inasmuch as appellant claimed on his direct appeal that there was insufficient evidence to sustain the conviction. (Pool, supra,

Pool complains that he was not advised of the kind of trial "he was going to reveive." The record belies that claim. At R. T. 106 appears the representation that Pool was "fully aware" that a stipulation was intended.

Pool objects to the competency of appellate counsel, Russell E. Parsons, because Parsons could have raised other issues. Such ground, appellant submits, is proven by his present makeweight arguments.

The simple fact appears from the entire record that there was no disagreement between the defendant, his counsel, and the prosecution as to what the facts were. There was merely a desire on behalf of the defendant to obtain some time prior to service of his sentence by taking an appeal.

B. APPELLANT WAS NOT DENIED A FAIR AND IMPARTIAL JURY TRIAL OR TRIAL OF ANY KIND.

> "Issues disposed of on a previous direct appeal are not reviewable in a subsequent petition under §2255." Stein v. United States, 390 F. 2d 625 (9th Cir. 1968).

This Court found in the direct appeal that there was a "valid waiver of jury." This Court's opinion found that Pool's action, and the Court's holding, guaranteed Pool a free and intelligent waiver. "In protecting any defendant's constitutional rights we do, and should, look beyond form to substance." Pool, supra, at 833.

In addition to Pool's claiming there was no waiver of a jury trial he claims he was deprived of a trial altogether because he and his counsel stipulated to the facts, thereby depriving him of the right of being confronted by the witnesses against him and the right to cross-examine them. It is submitted that the "free and intelligent waiver" found by this Court relative to a jury trial also applies to the instant claim.

Pool relies on Brookhart v. Janis, 384 U. S. 1 (1966), for the proposition that the instant case is the same as a plea of guilty over the objection of defendant himself. In Brookhart there was a prima facie case made by the prosecution without stipulation or cross-examination by the defense. The Supreme Court, relying on the Ohio court, found the procedure the equivalent of a plea of

guilty. The following language appears at page 7 of the Supreme Court's opinion:

> ". . . Although he expressly waived his right to a jury trial, he never, at any time, either explicitly or implicitly, pleaded guilty. His emphatic statement to the judge that "in no way am I pleading guilty" negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty. Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. . . "

In the instant case there was a stipulation of the facts by the defendant personally, his attorney, and the plaintiff. There was no disagreement as to what the facts were. No one can sincerely say that when there is no dispute as to the facts that he expects to challenge those facts by cross-examination.

Pool claims that there is no authority for a trial based on a stipulated factual situation. The very essence of any trial is the determination of facts and then an application of the law to those

facts. Inherent in the fact-finding process is the possibility that there may be no dispute as to the facts. Stipulations have historically been a part of lawsuits and no act of Congress is required in order to rely upon and utilize them.

C. APPELLANT WAS NOT COMPELLED TO BE A WITNESS AGAINST HIMSELF.

Pool claims that the presumption of Section 174 required him to be a witness against himself. Initially, Pool did not testify. Secondly, Pool has litigated the constitutionality of Section 174 already and the issue was determined adversely to his interests. Pool, supra.

D. POOL'S CONVICTION IS NOT BASED UPON EVIDENCE OBTAINED IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS AND THE ISSUE IS NOT THE PROPER SUBJECT OF A SECTION 2255 MOTION.

Absent a showing of a real miscarriage of justice, the admission of a confession at a trial is not subject to collateral attack under Section 2255. Hodges v. United States, 282 F. 2d 858 (D. C. Cir. 1960), cert. granted 365 U. S. 810, cert den. 368 U. S. 139.

Factually, the only matters found in the evidence before the trial court relative to admissions of the defendant are found in paragraphs 25 and 26 of the stipulation, supra. Said admissions

were to the effect that the heroin obtained had come from Memo in Tijuana.

Pool complains that the trial court should have held a *Jackson* v. *Denno* hearing relative to the admission of said statements. Nowhere does Pool cite any case that says a judge must, *sua sponte*, hold a hearing when there is no request therefor or an objection thereto. No cases are cited because such is not the law.

Pool assumes that his conviction is based upon, or dependent upon, the subject admissions. As this Court said earlier, because of the presumption of Section 174, reliance on the admissions was unnecessary. *Pool*, *supra*.

Assuming, *arguendo*, that the admissions were extracted by promises, they were not essential to the conviction. Assuming, *arguendo*, there was error, it was harmless.

E. THE CONVICTION SHOULD NOT BE VACATED BECAUSE OF A CLAIMED DELAY OF ONE MONTH FROM ARREST TO INDICTMENT.

Pool was arrested on January 17, 1964 [Stipulation *supra*, paras. 2, 19]. Pool was indicted on February 19, 1964 [C. T. I, 2-5].

Pool cites no cases for the proposition that a mere one month lapse of time between arrest and indictment is grounds for the granting of a Section 2255 motion. There is no claim that evidence became unavailable to him during that time.

As the trial court herein stated, at pages four and five of

its Order Denying Motion:

> "It appears from petitioner's motion that he contributed to and acquiesced in any alleged delay of trial by cooperating with federal agents in an effort to secure a lighter sentence, and is not, therefore, entitled to a dismissal. (United States v. Sawyers, 186 F. Supp. 264) It further appears that petitioner failed to make demand for speedy trial. He is, therefore, estopped at this late date from asserting delay as a ground for dismissal from custody. (United States v. Fossoulis, 179 F. Supp. 645).

F. NO HEARING WAS REQUIRED ON THE 2255 MOTION

As this brief demonstrates, there was no need for a hearing on the 2255 motion. Each of the arguments made by Pool are conclusively refuted by the court records or by the previous litigation in the case.

The only claim that might have been considered in a hearing was Pool's claim that he was "still under the influence of alcohol and the illness of the alcohol" on the "trial day" when coupled with the affidavit of Joe Ingber that "[t]his stipulation was not read by the defendant." Said claim does not state that Pool was not fully aware of the contents of the stipulation and understood it. It is interesting to note that Ingber did not say Pool didn't understand

what he was doing or was under the influence of alcohol. The mere fact that Pool may not have read the stipulation personally is immaterial inasmuch as it could have been read to him, as in fact, it was. A mere conclusion is not grounds for a hearing.

CONCLUSION

Based upon the foregoing arguments, the judgment of the District Court should be affirmed.

Respectfully submitted,

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